IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL JURISDICTION

WRIT PETITION NO.2799 OF 2002

Mr. Mohammed Maqsood Alam .. Petitioner

Versus

Mr. S.G. Kadam and Anr. .. .. Respondent

Mr. R.L. Nerlekar for the Petitioner.

Mr. R.S. Pai i/b S.Udeshi & Co. for the Respondent NO.2.

CORAM : S.K. SHAH, J.

DATED : 26.9.2005.

ORAL JUDGMENT :

1. Heard the Learned Counsels on both the sides.

2. The Petition is directed against the order passed by the Industrial Court, Mumbai in Complaint [ULP] No. 501 of 1990. The impugned order reads thus -

> *" In view of the above observations, Complainant is barred by principle of res - judicata, hence Complaint is not maintainable. Matter be proceeded according to law."*

3. The facts, in brief, are as under :

. The Petitioner was appointed as an "Instructor" by the Respondent No.1. The Respondent No.1 is a Motor Driving School and the Petitioner was appointed as Instructor in that Driving School. The Petitioner was initially getting Rs.1200/- per month salary. At the time of lodging of the complaint, the Petitioner was getting Rs. 1800/- per month salary. The other instructor was getting Rs.2100/- per month salary.

4. The Petitioner [Complainant] filed his complaint bearing Complaint [ULP] No.501 of 1990, alleging that the Respondents were indulging in unfair labour practice falling under Items 6, 9 and 10 of Schedule IV of the M.R.T.U. and P.U.L.P. Act, 1971 ['The Act' for short]. The allegations, in short, were that the Respondent No.1 was taking the Petitioner's signature on the cash voucher and was not allowing the Petitioner to sign the Muster Roll of the Respondent No.1; that his name is not mentioned in the Muster Roll; that there is another Instructor, who is also imparting the same service to the car trainees, but he is paid Rs. 2100/- per month salary; that he had not been issued any letter of appointment nor there is any agreement with the Respondent NO.1, though the Respondent No.1 has entered into an agreement with another Instructor; that the complainant is deprived of his legitimate and legal rights and the Respondent No.1 is continuing the complainant for years together as temporary and thus, the complainant is

being deprived of the status and privileges of permanent employees.

5. The Respondents have filed written statement. The Issues, which were framed in the said Complaint, reads as under :

ISSUES

1. *Does the Complainant prove that he is entitled to the benefit of permanency and other benefits?*
2. *Whether the regular nature of work can be allotted on contract basis just to avoid the claim of permanency?*
3. *Whether the respondent has committed unfair labour practices under Items 6,9 and 10 of Schedule IV of MRTU & PULP Act?*
4. *What order?*

6. These issues were decided and it was held in that Complaint that the complainant [Petitioner] was entitled to the benefit of permanency and other benefits, that the regular nature of work can not be allowed on a contract basis just to avoid the claim of permanency, that the Respondents have committed unfair labour practice under Item 6, 9 and 10 of Schedule IV of MRTU and PULP Act, 1971. The order, however, that was passed was as under :-

ORDER :-

1. *Complaint of the Complainant is hereby allowed.*

2. *Complainant is entitled to all the benefits like a permanent employee and will also be eligible for P.F., E.S.I. and Bonus after completion of 240 days of his service.*

3. *Respondents are directed to fix the salary and allowance of the complainant equal to other instructor and make all the differences of payment to complainant.*

4. *It is hereby declared that respondents have committed unfair labour practice under items 6, 9 and 10 of Schedule IV of the MRTU and PULP Act.*

5. *No order as to costs.*

7. Subsequent thereto, the Respondents had made fixation of the Petitioner's pay as per clause [3] of the order and communicated to the Petitioner. The Petitioner, however, did not accept the same and filed another complaint bearing Complaint [ULP] No.1453 of 1996 before the Industrial Court, Mumbai, wherein the aforesaid impugned order came to be passed holding that the Complainant was barred by the Principles of *Res - Judicata*.

8. It is further to be noted that this order came to be

passed on a Preliminary Point. That means, this Preliminary Issue was raised and Complaint came to be disposed of as having been barred by the Principles of *Res - Judicata.* **Needless to say that as provided by Section -11 of the Civil Procedure Code, the Principles of** *Res-Judicata is attracted* **when "***in the pervious litigation, the issue had directly and substantially been raised and had been heard and finally decided by the Court having jurisdiction to try such subsequent suit."*

9. Therefore, it would be necessary to see whether, in the earlier complaint bearing Complaint [ULP] NO. 501 of 1990, the issue, as to what and how the salary of the Petitioner shall be fixed while giving him the permanency benefits, was raised, heard and finally decided. I have already set out the nature of complaint and the prayers made in the Complaint No. 501 of 1990. The complaint was basically of Respondents having indulged in unfair labour practice as contemplated under Item 6, 9, 10 of Schedule IV of the Act. What was sought in the Complaint was a declaration that the Respondents have indulged in unfair labour practice; that the Respondents be directed not to terminate the services of the complainant without following due process of law; Respondents be directed to give letter of appointment to the

Petitioner; the Respondents be directed to give the status of permanent employee of the company. It is, therefore, clear that there was no prayer as to the fixation of the pay

or the salary of the Petitioner in the said complaint. It is also pertinent to note that there was no pleading as to what salary of the Petitioner [complainant] be fixed while granting him the benefit of permanency. What is mentioned in the complaint is that the other Instructor is getting salary of Rs. 2100/- per month. But that was only one of the points to emphasise that the Respondents were indulging in unfair labour practice and nothing more. It is further pertinent to note that even the issue in that regard was not framed. The perusal of the order dated 17.11.1995 passed on the Complaint No.501 of 1990 would show that there is absolutely no discussion as to at what rate and how the Petitioner's pay shall be fixed. Despite this, clause -3 of the said order came to be passed in the Complaint No. 501 of 1990 about fixing of the salary and allowance of the complainant equal to other instructor and make all the differences of payment to complainant [Petitioner].

10. Under these circumstances, it is absolutely clear that neither the issue was raised by raising specific pleading nor a finding was recorded in the Complaint No. 501 of 1990.

11. In these circumstances, the view taken by the Learned Industrial Court, on a Complaint [ULP] No. 1453 of 1996, while deciding the Preliminary Point that the complainant was barred by the Principles of *Res-Judicata*, was wholly

improper and illegal. The same, therefore, shall have to be set aside, hence order :

ORDER

1. **The Writ Petition No. 2799 of 2002 is allowed.**

2. **The order passed by the Industrial Court, dated 14.9.2000, on a Complaint [ULP] No. 1453 of 1996, holding that the complainant is barred by the Principles of** *Res -Judicata*, is hereby set aside.

3. **The Complaint [ULP] 1453 of 1996 is directed to be restored to file and shall be proceeded with in accordance with law.**

4. **The Rule is made absolute accordingly.**

[S.K. SHAH, J.]